

Remarks:

In the February 7, 2008, Office Action, the Examiner maintained and made final the restriction requirement that was initially made in the Office Action mailed September 11, 2007. Claims 39-60 were therefore withdrawn from further consideration as being drawn to nonelected inventions.

The species election requirement that had been made in the Office Action mailed September 11, 2007, was withdrawn in the February 7, 2008, Office Action.

Claims 1-60 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over: a. Claims 1-29, 31-33, and 35-72 of copending U.S. Patent Application No. 10/435,367; b. Claims 1-62 of copending U.S. Patent Application No. 10/946,598 (which Applicants believe contains a typographical error and should be 10/947,598); c. Claims 1-38 of copending U.S. Patent Application No. 11/225,562; and d. Claims 1-59 of copending U.S. Patent Application No. 11/500,835.

Claims 1-38 were rejected under 35 U.S.C. Section 112, second paragraph, as being indefinite for the inclusion of the words "or other animals" in Claim 1. Claim 23 was also rejected as containing the trademark/trade name "Yeast Cell Extract (2006) by Lesaffre."

On the merits, Claims 1, 10-14, 33, 35, and 38 were rejected under 35 U.S.C. Section 102(b) as being anticipated by the product "Equilibra 500" which the Examiner asserted has "effective filing date 1989."

Claims 1-17, 33-35, and 38 were rejected under 35 U.S.C. Section 103(a) as being unpatentable over the product "Equilibra 500" which the Examiner again asserted has "effective filing date 1989" in view of Kanter et al. (U.S. Patent No. 6,410,067). Claims 18-26, 36, and 37 were rejected under 35 U.S.C. Section 103(a) as being unpatentable over the teaching of "Equilibra 500," which the Examiner asserted has "effective filing date 1989," by itself or combined with Kanter et al., and "the teaching of Alltech."

Claims 27 and 28 were rejected under 35 U.S.C. Section 103(a) as being unpatentable over the teaching of "Equilibra 500," which the Examiner asserted has "effective filing date 1989," by itself or combined with Kanter et al., and Mozaffar et al. (U.S. Patent No. 6,096,870). Claims 29-32 were rejected under 35 U.S.C. Section 103(a) as being unpatentable over the teaching of "Equilibra 500," which the Examiner asserted has "effective filing date 1989," by itself or combined with Kanter et al., and Duckworth et al. (the article "Arteriovenous Differences for Glutamine in the Equine Gastrointestinal Tract").

Claim Amendments

Applicants have cancelled nonelected Claims 39-60. Applicants have also amended Claim 1 and cancelled Claim 23 in response to 35 U.S.C. Section 112 issues raised in the February 7, 2008, Office Action. No new matter has been added.

Double Patenting Rejections

In response to the four (4) double patenting rejections, Applicants have decided to remove these issues by filing Terminal Disclaimers. Accordingly, accompanying this Amendment A are four (4) Terminal Disclaimers in compliance with 37 CFR Section 1.321(b) to overcome all four (4) of the double patenting rejections. The conflicting patent applications, U.S. Patent Application Nos. 10/435,367, 10/947,598, 11/225,562, and 11/500,835 are all assigned to Freedom Health, LLC, the assignee of the present patent application.

Section 112 Rejections

With regard to the 35 U.S.C. Section 112, second paragraph, rejection of Claims 1-38 as being indefinite, Applicants have amended Claim 1 to delete the words "and other animals" from the preamble to eliminate this rejection. With regard to the further 35 U.S.C. Section 112, second paragraph, rejection of Claim 23 as being indefinite, for the inclusion of the trademark/trade name, Applicants have cancelled Claim 23 to eliminate this rejection. All Section 112 rejections thus have been addressed.

Section 102(b) Rejection

Claims 1, 10-14, 33, 35, and 38 were rejected under 35 U.S.C. Section 102(b) as being anticipated by the product "Equilibra 500" which the Examiner asserted has "effective filing date 1989." Applicants respectfully traverse this rejection as being deficient for a number of reasons.

First, contrary to the assertion of an "effective filing date 1989," the reference has no filing date since it is neither a patent nor a patent application. Indeed, it is impossible for a reference that is neither a patent nor a patent application to have a filing date. Accordingly, Applicants believe that the assertion of the reference in the February 7, 2008, Office Action must have been intended either as a printed publication or as a public use or on sale event in the U.S. more than one year prior to the March 17, 2004, filing date of the present patent application, and have responded herein accordingly. See, 35 U.S.C. Section 102(b).

Applicants note that the five (5) page Equilibra 500 reference used by the Examiner in the February 7, 2008, Office Action has a date of January 10, 2008, which is located in the lower right corner of each of pages 1, 4, and 5 of the Equilibra 500 reference. These three dates, which may be the dates upon which the Examiner printed these three (3) pages, are the only specific dates that are identified in the Equilibra 500 reference. The only other reference of any kind to a date in the Equilibra 500 reference is found on its first page, where the following sentence appears:

"Uniquely formulated and proven since 1989, Equilibra is **not** a feed supplement, but a pelleted, complimentary horse feed, composed entirely of extremely high quality natural ingredients - many of which are normally available only as expensive additives."

Applicants believe that the Examiner has interpreted this sentence to mean that the Equilibra 500 product has been available since 1989, which is absolutely incorrect.

Applicants note that the sentence does not establish in any way that the Equilibra 500 product has been available since 1989. Rather, it states that an Equilibra product has been available since 1989. The original Equilibra product was a completely different product that was the predecessor of the Equilibra 500 product. As stated in the above quotation, "Equilibra is **not** a feed supplement, but a pelleted, complimentary horse feed..." It is thus readily apparent that the Equilibra product referred to in the above quotation was not a feed supplement of the nature of either the present invention or the Equilibra 500 product.

There is not a single word in the entire Equilibra 500 reference cited in the February 7, 2008, Office Action that indicates that the Equilibra 500 product was in public use or on sale event in the U.S. in 1989, or at any date that is more than one year prior to the March 17, 2004, filing date of the present patent application. As to the date of the Equilibra 500 reference itself as a potential printed publication, it appears that it was printed by the Examiner on January 10, 2008, and there was absolutely no evidence provided in the February 7, 2008, Office Action that would establish that the Equilibra

500 reference was available at any time prior to January 10, 2008, far less having been available more than one year prior to the March 17, 2004, filing date of the present patent application.

Thus, even from this limited analysis, it is apparent that the Equilibra 500 reference is not a Section 102(b) document, since the February 7, 2008, Office Action has failed to establish that the Equilibra 500 product or any documents relating thereto either constituted a printed publication, or were evidence of a public use or on sale event occurring in the U.S., more than one year prior to the March 17, 2004, filing date of the present patent application.

Even so, Applicants were not content to cease the analysis of the Equilibra 500 product at this point, and have conducted more research in order to conclusively establish that the Equilibra 500 product cannot possibly be a Section 102(b) reference to the present invention. The evidence that Applicants have obtained at this point is overwhelming, and will be presented hereinbelow.

A review of the Equilibra 500 reference has established that it is actually three (3) different web pages: 1. page 1 of the Equilibra 500 reference bears thereupon the web address of http://www.thenaturalapproach.co.uk/horseproduct_pages/Equilibra.html; 2. pages 2 and 3 of the Equilibra 500 reference have been identified by Applicants as having a web address of <http://www.thefeedbin.freervers.com/thefeedbinEQUI500.pdf>; and 3. pages 4 and 5 of the Equilibra 500 reference bear thereupon the web address of

[http://www.lillidale.co.uk/iqs/sid.0466795062011075001413/print.1/dbitemid.128/sfa.vie
w/nutrition.html](http://www.lillidale.co.uk/iqs/sid.0466795062011075001413/print.1/dbitemid.128/sfa.vie
w/nutrition.html).

Applicants have checked the web address of page 1 of the Equilibra 500 reference on the Internet Archive (also referred to as the WayBack Machine, and available on the Internet at www.web.archive.org) and have found that the Internet Archive contains 16 earlier instances of this web page. The earliest instance that contains a reference to the Equilibra 500 product is dated June 29, 2007. The next earlier instance of this web page, which is dated March 12, 2005, (as well as all still earlier instances of this web page) contains absolutely no reference to the Equilibra 500 product, but includes the identical sentence quoted above which refers to the Equilibra product and the year 1989.

Applicants note that the date of June 29, 2007, is more than three (3) years after the filing date of the instant patent application, and thus page 1 of the Equilibra 500 reference is conclusively and utterly disqualified from being Section 102(b) prior art. Applicants' research with regard to the web address of page 1 of the Equilibra 500 reference on the Internet Archive is attached hereto as Appendix A.

Applicants have checked the web address of pages 2 and 3 of the Equilibra 500 reference on the Internet Archive and have found that the Internet Archive does not contain any earlier instances of this web page, thereby indicating that it is of relatively recent origin. Applicants further checked for all pages stored in the Internet Archive for the website <http://www.thefeedbin.freesevers.com> and determined that there are 69

pages stored in the Internet Archive, with the earliest of these pages being dated June 17, 2004. Applicants note that the date of June 17, 2004, is three (3) months after the filing date of the instant patent application, and thus pages 2 and 3 of the Equilibra 500 reference are also conclusively and utterly disqualified from being Section 102(b) prior art. Applicants' research with regard to the web address of pages 2 and 3 of the Equilibra 500 reference on the Internet Archive is attached hereto as Appendix B.

Applicants have checked the web address of pages 4 and 5 of the Equilibra 500 reference on the Internet Archive and have found that the Internet Archive does not contain any earlier instances of this web page, thereby indicating that it is also of recent origin. Applicants further checked for all pages stored in the Internet Archive for the website <http://www.lillidale.co.uk> and determined that there are twelve (12) pages stored in the Internet Archive that are prior to the March 17, 2004, filing date of the present patent application. Applicants have checked each of these pages, as well as each of the pages linked to therefrom, and have determined that there are no references whatsoever to either the Equilibra 500 product or the Equilibra product contained therein. Thus pages 4 and 5 of the Equilibra 500 reference are also conclusively and utterly disqualified from being Section 102(b) prior art. Applicants' research with regard to the web address of pages 4 and 5 of the Equilibra 500 reference on the Internet Archive is attached hereto as Appendix C.

In summary, the Equilibra 500 reference is quite simply not Section 102(b) prior art, since none of it was available more than one year prior to the March 17, 2004, filing date of the present patent application.

Furthermore, Applicants have made direct inquiries of Gro-Well Feeds Limited, the manufacturer of the Equilibra 500 product, as to when the Equilibra 500 product was introduced. In response to these inquiries, Applicants have learned that the Equilibra 500 product was first introduced (presumably in the UK and not in the U.S.) by Gro-Well Feeds Limited in December, 2004, over eight (8) months after the March 17, 2004, filing date of the present patent application. Applicants were so informed by Stephen Tucker, the Managing Director of Gro-Well Feeds Limited. Applicants have attached as Appendix D an e-mail string that conclusively establishes this fact. (Applicants have redacted portions of the e-mail string that are not germane to the issue at hand.)

Thus, for all of the reasons provided above, it is quite apparent that the Section 102(b) rejection based upon the Equilibra 500 reference is clearly erroneous, and must be withdrawn. Accordingly, the withdrawal of the Section 102(b) rejection of Claims 1, 10-14, 33, 35, and 38 is respectfully requested.

Section 103(a) Rejections

Claims 1-17, 33-35, and 38 were rejected under 35 U.S.C. Section 103(a) as being unpatentable over the product "Equilibra 500" which the Examiner asserted has "effective filing date 1989" in view of Kanter et al. Applicants respectfully traverse this rejection as

being deficient since the Equilibra 500 reference has conclusively been established above to not constitute prior art. Accordingly, the withdrawal of the Section 103(a) rejection of Claims 1-17, 33-35, 38 is respectfully requested. Since the remaining Claims 18-32, 36, and 37 are all dependant upon Claims 1 or 35, they are likewise allowable by virtue of the fact that they are dependant upon allowable claims. Accordingly, the allowance of Claims 18-32, 36, and 37 is also respectfully requested.

Discussion of the remaining Section 103(a) rejections is thus believed to be completely moot in view of the failure of the Equilibra 500 reference to constitute prior art. No inference may be drawn of any acquiescence by Applicants to any interpretation or applicability of any of the references that were made in the February 7, 2008, Office Action other than the Equilibra 500 reference, and any such acquiescence is hereby expressly disclaimed.

Conclusion

Claim 1-22 and 24-38 remain pending. Reconsideration of the claimed subject matter is respectfully requested, with an early and favorable decision being solicited. Should the Examiner believe that the prosecution of the application can be so expedited,

the Examiner is requested to call Applicants' undersigned attorney at the number listed below.

Respectfully submitted:

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